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No. 93-1180

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

AUTO CLUB INSURANCE ASSOCIATION,

Petitioner,

v.

PENTWATER WIRE PRODUCTS, INC. SELF-FUNDED EMPLOYEE HEALTH BENEFIT PLAN,

Respondent.

AUTO CLUB INSURANCE ASSOCIATION,

Petitioner,

v.

FREDERICK & HERRUD, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

BRIEF IN RESPONSE TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Pentwater Wire Products, Inc. Self-Funded Employee Health Benefit Plan (the Respondent Plan) objects to the form and substance of the questions presented in Petitioner's Petition For Writ of Certiorari to the United States Supreme Court (Petition), and believes the questions should be as follows:

1. Where Petitioner asserted a claim against the Respondent Plan allegedly as the subrogee of a "beneficiary" of an ERISA Plan, can Petitioner circumvent the express limitations of ERISA Section 502 – which governs the rights of an ERISA Plan "beneficiary" – and, instead, pursue a remedy under the "federal common law" which would conflict with the express language of ERISA Section 502?

2. If Petitioner now proceeds in some capacity other than as a subrogee of an ERISA Plan participant, does this Court have jurisdiction to consider Petitioner's claim where the Michigan Supreme Court would have lacked subject matter jurisdiction to consider such a claim?

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STATEMENT OF THE CASE

Petitioner is an automobile insurer. Respondent is a self-funded ERISA benefit plan. Petitioner insured a woman who claimed to be a beneficiary of Respondent Plan. Petitioner paid medical expenses incurred by its insured after an automobile accident. Petitioner then sought to recover those medical expenses from Respondent Plan. After the Michigan Court of Appeals determined that there was no state law basis for Petitioner's claim, because any state law remedy was preempted by ERISA, Petitioner then asked the Michigan Supreme Court to create a "federal common law" remedy. The Michigan Supreme Court refused to do so. The Michigan Supreme Court concluded that Petitioner could proceed as a subrogee of its insured, but, as a subrogee, Petitioner's rights were governed by the terms of the ERISA Plan. Pet.App. A-28.

Respondent does not agree that Petitioner can properly proceed as a subrogee.[1] However, assuming Petitioner could do so, the Michigan Supreme Court's holding that Petitioner's rights, as subrogee, are governed by the terms of the ERISA Plan is not only correct, it enforces ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which creates a civil cause of action for a

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[1] As this Court again emphasized in *Mertens v. Hewitt Associates, Inc.*, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161, 167(1993), claims and remedies under ERISA are limited to those specifically set forth in the statute's "comprehensive and reticulated" civil enforcement provision. Thus, this Court reemphasized, in *Mertens*, 124 L.Ed.2d at 169, its "unwillingness to infer causes of action in the ERISA context. . . ." In essence, the Michigan Supreme Court inferred a cause of action in favor of the subrogee of an ERISA plan participant or beneficiary.

"participant" or "beneficiary" of an ERISA Plan but limits the remedies of a "participant" or "beneficiary" to rights or benefits "under the terms of the plan."

Having failed to persuade the Michigan Supreme Court, Petitioner now attempts to have this court create a new "federal common law" right which would allow Petitioner, as subrogee, to circumvent the terms of the ERISA Plan. The petition lacks merit and should be denied.

FACTUAL BACKGROUND

A. The Nature of the Action Below

This dispute arises out of the payment of medical expenses which were incurred by Alice Guetzka as a result of an automobile accident in June, 1985. At the time of the accident, Ms. Guetzka was insured by Petitioner. Ms. Guetzka was separated from her husband. Petitioner paid those expenses, but Petitioner then sought to recover the expenses from the Respondent Plan. The Respondent Plan denied that it had liability for Ms. Guetzka's medical expenses for two reasons: (1) Mrs. Guetzka was not a "participant" or "beneficiary" of the Respondent Plan, and (2), even if she was, the Respondent Plan did not pay medical expenses arising out of an automobile accident where there was coverage under an automobile insurance policy. Pet.App. A-105.

B. Petitioner's Complaint Against The Respondent Plan

Petitioner filed a one count complaint in a Michigan state court against the Respondent Plan seeking

reimbursement for medical expenses it paid on behalf of its insured. Petitioner alleged that its auto policy contained a provision stating that "sums paid or payable" under Petitioner's policy must be reduced by "any amount paid or payable under any valid and collectible" insurance policy or health care plan. Petitioner then alleged that it owed only secondary coverage to Ms. Guetzka.

Petitioner's prayer for relief contained two requests: (1) a judgment for moneys already paid by Petitioner on behalf of Ms. Guetzka and (2) a judgment declaring that the Respondent Plan, not Petitioner, had liability for all medical expenses incurred in the future.

C. The Respondent Plan's Defenses

The Respondent Plan asserted several defenses to Petitioner's claims, including: (1) Petitioner's claims based on state law were preempted by ERISA; (2) assuming Petitioner's state law claims were not preempted, Ms. Guetzka was not entitled to benefits because she was not covered by the Respondent Plan at the time of the accident.

D. The Federal Court Remand

Respondent Plan removed Petitioner's complaint to federal court. The District Court remanded the case, however, finding – prior to this Court's decision in *FMC Corp. v. Holiday*, 498 U.S. 52 (1990) – that (1) ERISA did not preempt Petitioner's state law claim and (2) there was no federal jurisdiction because "[Petitioner] pleads a state law cause of action only. . . . " Pet.App. A-88. The District Court also observed, in a footnote, that Petitioner Auto

Club might have a right to sue under ERISA Section 502 as a subrogee of a participant or beneficiary, but that it was not necessary to decide this question given the nature of Petitioner's claim. Pet.App. A-87 n.1.

E. The Circuit Court's Judgment

The Circuit Court granted judgment for Petitioner based on (1) its determination that, as a matter of state law, Ms. Guetzka was covered by the Respondent Plan and (2) its determination that, under Section 3109a of the Michigan No Fault Act, Respondent Plan had primary liability for the losses incurred by Ms. Guetzka. The Circuit Court held that Petitioner's state law claims were not preempted by ERISA. *See* Pet.App. A-6 n.11

F. Respondent Plan's Appeal

On appeal, the Michigan Court of Appeals held that ERISA preempted Petitioner's state law claims. Therefore, the Michigan Court of Appeals did not address the Respondent Plan's other arguments based on state law.

G. Petitioner's Application For Leave To Appeal

Petitioner filed an application for leave to appeal to the Michigan Supreme Court and, *for the first time,* raised an issue of federal law. In this application, Petitioner finally conceded that ERISA preempted Section 3109a – thus conceding the very issue presented to the Court of Appeals – but Petitioner contended that it was entitled to prevail against the Respondent ERISA Plan based on

federal common law. In order to establish state court jurisdiction over this new federal claim, Petitioner contended that it was proceeding as a subrogee of its insured. ERISA Section 502(e), 29 U.S.C. § 1132(e), grants state courts "concurrent jurisdiction" over a claim brought by a "participant" or "beneficiary" pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

The Michigan Supreme Court agreed that Petitioner could proceed as a "subrogee," but it then concluded that Petitioner did not have a "federal common law" right to seek reimbursement from Respondent Plan. The Michigan Supreme Court correctly observed that, by its express language, the Respondent Plan did not provide coverage for medical expenses arising out of an automobile accident where there was also automobile insurance. It then held that "the ERISA plans' terms control." Pet.App. A-28. The Michigan Supreme Court found that this result not only promoted the policies underlying ERISA but that it also "furthers the state interest of fostering the existence of health and welfare benefit plans for its citizens." Pet.App. A-28.

H. The Respondent Plan

Paragraph 4.17 of the Respondent Plan is entitled "Coordination of Benefits." Paragraph 4.17-3 then states:

> A Plan without a coordinating provision shall always be deemed to be the primary Plan. If all or any other Plan has such a provision that makes This Plan primary, then: * * *
>
> (4) no-fault Auto coverage is always considered to be the primary Plan, and This Plan

> shall be deemed to provide only "excess insurance." [Pet.App. A-105]

Petitioner did not challenge this language; Petitioner simply contended that this language did not apply to it, arguing, initially, that this language was rendered inoperative by Section 3109a of the Michigan No-Fault Act and, later, that this language was rendered inoperative by "federal common law."

I. Michigan Insurance Law Provisions

Prior to filing its brief before the Michigan Supreme Court, Petitioner based its claim on Section 3109a of the Michigan No Fault Insurance Act, M.C.L. 500.3109a, which provides:

> An insurer providing personal protection insurance benefits shall offer . . . deductibles and other exclusions reasonably related to *other health and accident coverage on the insured.* [Emphasis added.]

The Respondent Plan does not provide "other health and accident coverage" within the meaning of this provision, as Petitioner now concedes.

REASONS FOR DENYING THE PETITION

Petitioner's brief does not once cite ERISA Section 502. This demonstrates the fundamental flaw in the petition. ERISA Section 502 governs the rights of a "participant" or "beneficiary" claiming against an ERISA plan,

and ERISA Section 502(a) requires any claim by a "participant" or "beneficiary" to be decided "under the terms of the plan." Assuming Petitioner could proceed as the subrogee of a "participant" or "beneficiary,"[2] Petitioner's claims would be governed by ERISA Section 502. But, as its failure even to cite ERISA Section 502 demonstrates, Petitioner refuses to be bound by ERISA Section 502.

The reason is obvious: ERISA Section 502 does not permit Petitioner to recover any moneys from the Respondent Plan because, "under the terms of the plan," there is no coverage for medical expenses arising out of an automobile accident. Where there is also automobile insurance.

Because it has no remedy under ERISA Section 502, Petitioner wants this Court to create a "federal common law" granting Petitioner rights not granted by ERISA itself. Petitioner argues that this "federal common law" is necessary to promote uniformity. There is no need for a new "federal common law" rule to create uniformity because ERISA Section 502 already provides a uniform federal rule.

Petitioner tries to avoid ERISA Section 502 by arguing that this case is really about a conflict between "coordination of benefit" provisions. But, in this case, there is no conflict. Petitioner created jurisdiction under ERISA by arguing that it was the subrogee of a "participant" or

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[2] *See* Footnote 1 above. This issue is also addressed in a brief which Frederick & Herrud, Inc. will file in opposition to the petition. Respondent Plan adopts Frederick & Herrud's arguments against establishing the right of Petitioner to proceed as a subrogee of its insured.

"beneficiary."[3] But, as a subrogee, Petitioner has no right to make claims under Petitioner's insurance policy. As subrogee, Petitioner is bound by the terms of the Respondent Plan.

It is possible that in some other case at some other time this Court may be called upon to decide a conflict among other "coordination of benefit" provisions – for example, a conflict between the "coordination of benefit" provisions in two ERISA plans[4] – but this is not that case. ERISA provides a uniform rule governing claims against an ERISA plan by participants, beneficiaries or subrogees. The proposed "federal common law" solution proposed by Petitioner is not only unnecessary, it would effectively overrule ERISA Section 502. The Petition is without merit, and it should be denied.

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[3] If Petitioner is not a "subrogee," then the Michigan Supreme Court lacked subject matter jurisdiction. ERISA Section 502(e), 29 U.S.C. § 1132(e), expressly and unequivocally provides that state courts have "concurrent jurisdiction" over a claim brought by a "participant" or "beneficiary" pursuant to ERISA Section 502(a)(1)(B). Thus, a state court is limited to determining the rights of a "participant" or "beneficiary" "under the terms of" an ERISA Plan. A state court has no jurisdiction to determine rights under some other body of law, federal or state.

[4] *See, e.g., P.M. Group Life Ins. Ass'n v. Western Growers Assurance Trust*, 953 F.2d 543, 547 (9th Cir. 1992). This court recently refused to review a case involving the proper application of federal common law to resolve disputes between ERISA Plans. *Blue Cross/Blue Shield of Connecticut v. Inter Valley Health Plan*, 62 U.S.L.W. 3469 (Jan. 18, 1994).

A. Because Petitioner Can Only Assert A Claim As Subrogee, ERISA Section 502 Provides A Complete, Exclusive Remedy For That Claim, And There Is No Need For This Court To Create A "Federal Common Law" Remedy

At root, Petitioner's argument is founded on a confusion of its separate roles: when it made its state law claim, Petitioner was proceeding as an automobile insurer which had been granted special rights by Section 3109a of the Michigan No-Fault Act against other insurers offering "health and accident coverage." To succeed as an "auto insurer," Petitioner had to argue that the Respondent Plan was an "Insurer" within the meaning of Section 3109a. That claim arose solely under state law. When the Michigan Court of Appeals held that ERISA preempted Petitioner's state law claim, Petitioner abandoned its claims as an auto insurer. Instead, Petitioner argued that: (1) it was entitled to prevail as the "subrogee" of its insured, (2) this new claim as subrogee was founded on federal law, and, therefore, (3) it was not affected by ERISA preemption.

However, Petitioner refused to accept the limits inherent in its status as a subrogee. Instead of standing in the shoes of its insured, taking whatever rights a "participant" or "beneficiary" might have "under the terms of the plan" – as ERISA Section 502 requires – Petitioner argued that it had greater rights created by "federal common law" because of its status as an auto insurer whose insurance policy had a "coordination of benefits" provision which conflicted with the terms of the Respondent Plan. Thus, the new "federal common law" which Petitioner advocated had nothing to do with the rights of

a "participant" or "beneficary." Petitioner's confusion of roles is most evident when Petitioner argues:

> . . . the Michigan Supreme Court misapprehended the nature of the conflict presented to it. The question was not whether § 3109a should be permitted to create an "artificial conflict" (A-28) between the *parties' contracts.* The inapplicability of state law, which necessarily includes state statutes was given. Thus, the conflict was not, and could not be, between § 3109a and the ERISA. Rather, the conflict was between the irreconcilable COB clauses in the *parties' contracts.* The result of the court's failure to appreciate the nature of the conflict created was an almost perfect circularity of reasoning. [Pet.Br. at 11-12. Emphasis added.]

By the "parties' contracts," Petitioner refers, of course, to the Respondent Plan and Petitioner's automobile insurance policy. But, as subrogee, that insurance policy has no status whatsoever. Ms. Guetzka could not attempt to argue for benefits from the ERISA Plan based on alleged rights under her automobile policy; and neither can Petitioner, as subrogee of Ms. Guetzka.

The Michigan Supreme Court did not misapprehend the nature of the conflict presented to it. The Michigan Supreme Court fully understood that, as subrogee, Petitioner was bound by the terms of the Respondent Plan. That is precisely what the Michigan Supreme Court held. Thus, there is no need for some additional "federal common law" to resolve some imagined dispute.

More importantly, any attempt to create a "federal common law" right would frustrate the statutory scheme established by ERISA. ERISA Section 502(a) states:

A civil action may be brought –

> (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. * * *

This Court has repeatedly emphasized that ERISA Section 502 provides a comprehensive, exclusive enforcement section. *Mertens*, 124 L.Ed.2d at 169, reemphasized this Court's "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly," quoting from *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985). Thus, Section 502(a) provides an exclusive remedy for anyone claiming benefits under an ERISA Plan; and it carefully and deliberately states all of the claims and remedies that can be pursued under ERISA, **all** of the parties that may bring such claims and **all** of the parties that can be deemed liable on such claims. As this Court stated in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987):

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely

> undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under a state law that Congress rejected in ERISA. * * *
>
> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

So too would the federal scheme be "completely undermined" if the subrogee of an ERISA Plan participant were free to obtain remedies under "federal common law" that Congress rejected in ERISA. *See also Mertens,* 124 L.Ed.2d at 169 ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.").

In its decision, the Michigan Supreme Court confirmed that ERISA Section 502 also serves an important state purpose.

> Moreover, and of equal importance, we are persuaded that the federal policy furthers the state interest of fostering the existence of health and welfare benefit plans for its citizens. Thus, the perceived conflict between state and federal policy is not as marked as plaintiff would have us believe. Earlier we noted that there is no law requiring the establishment or funding of ERISA health and welfare benefit plans. We are also unaware of any state law requiring similar protection. Therefore, there is a considerable state interest in facilitating the creation and voluntary funding of such plans, especially in cases in which there is no automobile no-fault or other insurance to provide benefits. For these reasons,

> we conclude that MCL 500.3109a; MSA 24.13109(1) does not reach an ERISA plan with a COB clause where that clause is unambiguous. [Pet.App. A-28]

In short, there is no need for a new "federal common law" remedy which would change the carefully balanced statutory scheme.

B. Creating A New "Federal Common Law" Would, In Effect, Mandate Benefits Even Though Congress Refused To Do So

The "federal common law" solution should also be rejected because it would directly conflict with Congress' intention to let ERISA Plans themselves determine the benefits that they will provide. As this Court observed in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981), under ERISA, "private parties, not the Government, control the level of benefits. . . . " 451 U.S. at 511.

There can be no doubt that Petitioner's "federal common law" would mandate benefits. Under Petitioner's proposed "federal common law," the ERISA Plan would be forced to pay benefits any time some other insurer tried to shift costs to the ERISA Plan by including a "coordination of benefits" provision in the insurance policy requiring the ERISA Plan to absorb some or all of the medical costs arising out of an automobile accident.

By inserting such a provision in its policy, an auto insurer would create a conflict with any ERISA plan which did not cover automobile accidents. The proposed "federal common law" would then resolve the conflict by forcing the ERISA Plan to pay half of the medical costs. In

other words, the "federal common law" would mandate benefits.

C. There Is No Conflict Among The Circuits On This Issue

Petitioner's brief purports to find a conflict among the circuits on this issue. There is no conflict. None of the cases cited by Petitioner addressed the specific issue addressed by the Michigan Supreme Court and, more importantly, the case which allegedly proves the conflict, *Winstead v. Indiana Ins. Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. den.*, 488 U.S. 1030 (1989), was decided before this Court's decisions in *FMC Corp.*[5] and *Mertens*. That fact is important because *Winstead* assumed that state law principles could be used to resolve a dispute between an ERISA Plan and an insurer. However, once one accepts that ERISA preempts these state laws – as one must after *FMC Corp.* – *Winstead's* reasoning loses its force. Further, after *Mertens*, *Winstead's* expansive view of the role of "federal common law" is no longer sound.

Winstead's reasoning is especially irrelevant where the auto insurer is not proceeding as auto insurer under state law but, instead, is proceeding as a subrogee of an

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[5] While the Sixth Circuit did suggest, in *Lincoln Mutual Casualty Co. v. Lectron Products, Inc. Health & Welfare Plans*, 970 F.2d 206, 211 (6th Cir. 1992), that a dispute between an auto insurer and an ERISA Plan could be resolved by prorating responsibility for the medical expenses, the Sixth Circuit refused to decide the question. Instead, it remanded to the district court for further consideration.

ERISA plan "participant" or "beneficiary." In that capacity, there simply is no conflict to be resolved by "federal common law"; and any attempt to create a "federal common law" remedy for the auto insurer would effectively "revise the text of the statute," which *Mertens* found to be improper. The rights of the subrogee must be decided solely by reference to the terms of the ERISA Plan itself.

D. Petitioner Cannot Claim Some Different Status In This Court Because The Sole Basis For Jurisdiction To Decide The Federal Claim Was ERISA Section 502(e) Which Only Grants A State Court Concurrent Jurisdiction To Decide Claims Brought Pursuant To ERISA Section 502(a) By A "Participant" or "Beneficiary"

While Petitioner attempts to introduce a conflict between its insurance policy and the ERISA Plan, the Michigan Supreme Court lacked subject matter to resolve this issue. ERISA Section 502(e), 29 U.S.C. § 1132(e), expressly and unequivocally states that state courts only have "concurrent jurisdiction" over a claim brought pursuant to ERISA Section 502(a)(1)(B), namely, a claim brought by a "participant" or "beneficiary" which seeks:

> (B) to recover benefits due him *under the terms of the plan*, to enforce his rights *under the terms of the plan*, or to clarify his rights to future benefits *under the terms of the plan*. . . . [29 U.S.C. § 1132(a)(1)(B). (Emphasis added.)]

Thus, the Michigan Supreme Court did not have jurisdiction to decide a claim not based on ERISA Section 502, and Petitioner cannot attempt to advance such a claim in this court.

CONCLUSION

The Petition should be denied.

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